85-984

Supreme Court, U.S.
FILED
DEC 5 1985
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,

Petitioner,

vs.

QANTAS AIRWAYS, LTD.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does the Railway Labor Act's duty to exert every reasonable effort to make and maintain agreements require a finding that the District Court's decision in that regard was clearly erroneous?

PARTIES

The parties listed in the caption of this petition were parties in the Court of Appeals.

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PETITION FOR WRIT OF CERTIORARI

International Association of Machinists and Aerospace Workers, AFL-CIO ("IAM") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

Neither the opinion of the United States District Court for the Northern District of California (A. 1)[1] nor the

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[1] References to pages in the Appendix to this Petition are designated "A."

opinion of the Ninth Circuit Court of Appeals (A. 26) is officially reported.

JURISDICTION

The judgment of the Court of Appeals was entered on September 6, 1985. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Railway Labor Act ("RLA") §§ 2, First, Seventh, 4, 5, and 202, 45 U.S.C. §§ 152, First, Seventh, 155, 156 and 182, are reproduced in the Appendix (A. 31-42).

STATEMENT OF THE CASE

This action was brought in the United States District Court by the IAM on behalf of certain employees of Qantas Airways, Ltd. IAM is the certified "representative," as defined in § 1, Sixth of the RLA, 45 U.S.C. § 151, Sixth, for employees in the crafts or classes of airline mechanics and ramp and stores employees and office, clerical and passenger services employees. Until February, 1983, the IAM-represented workers were employed by Qantas in the United States cities of Honolulu and San Francisco.

The dispute out of which this litigation arose centers on Qantas' conduct during negotiations to amend a collective bargaining agreement between the IAM and Qantas. Prior to the negotiations, the parties exchanged opening proposals pursuant to the requirements of the RLA. Negotiations commenced in March, 1982. Qantas presented six proposals to the IAM. These six proposals, if implemented, would

permit Qantas to contract out all of its work in the United States that had been performed by IAM-represented employees. Conferences between the parties and efforts by the National Mediation Board to achieve settlement were unsuccessful.

On January 6, 1983, concluding that mediation had failed, the National Mediation Board released the parties to their self-help remedies. Additional efforts to reach settlement during the ensuing 30-day "cooling-off" period failed. On February 6, 1983, at the expiration of the "cooling-off" period, Qantas implemented its proposal to contract out the airport work in Honolulu and San Francisco and terminated 227 employees represented by the IAM.

On February 9, 1983, the IAM filed its Complaint alleging, *inter alia*, that Qantas had violated the RLA by failing and refusing "to exert every reasonable effort to make and maintain agreements" with the IAM as required by the RLA. The District Court found that Qantas did not fail "to exert every reasonable effort" prior to terminating the 227 employees.

The IAM appealed the decision of the District Court to the United States Court of Appeals for the Ninth Circuit. The Court of Appeals affirmed the District Court's decision and held that the District Court's finding that Qantas had met its RLA duty "to exert every reasonable effort to make and maintain agreements" prior to terminating its employees was not "clearly erroneous."

REASONS FOR GRANTING THE PETITION

The Court of Appeals has decided a federal question in a way that will impact industrial relations and which has not been, but should be, decided by this Court.

ARGUMENT

I

QANTAS' ACTIONS AT AND AWAY FROM THE BARGAINING TABLE WERE VIOLATIVE OF THE RAILWAY LABOR ACT

The Court of Appeals' decision that the District Court's finding was a permissible view of the evidence completely undermines the law governing labor relations in the railway and airline industries, which mandates that parties not only exercise good faith in their negotiations, but that they "exert every reasonable effort to make and maintain agreements . . . " so as to avoid interruption to commerce and to the operations of these two fundamental transportation industries. 45 U.S.C. § 152, First.

By holding that the District Court's ultimate finding that Qantas did not fail to meet its RLA obligation was based on a permissible view of the evidence, the Court of Appeals endorsed an approach to collective bargaining negotiations which violates the objectives of that important statute. Fundamentally, the decision of the Court of Appeals makes it possible for a carrier to take the position that its intent to contract out bargaining unit work is "non-negotiable," withhold relevant information that might give a union a basis for alternative proposals, discourage the making of

alternative proposals, and then make it economically difficult to back out of its "serious" and "non-negotiable" position. The effect of the lower court's endorsement can only interfere with stable labor relations in the airline industry contrary to the goal of national labor policy as set forth in the RLA.

A. The Qantas Approach to Negotiations

Many of the facts of this case, as found by the District Court itself, illustrate the unlawful approach taken by Qantas in this matter. The District Court found that in September, 1982 — six months after negotiations had commenced and Qantas had continuously expressed the unique "seriousness" of its proposals — IAM representatives were told by Qantas' Chief Executve Officer that its "position on contracting-out to save excess costs was 'non-negotiable.' " (A. 13, Finding of Fact 54)

This statement by Qantas' top management person presents one of the more egregious examples of Qantas' intransigence throughout the negotiations. The Chief Executive Officer did not state to the IAM representatives that Qantas would be willing to try other cost-saving measures that would save the jobs of over 200 employees or suggest what these measures might be. Instead, Qantas' top management person simply stated that the decision to contract out the jobs of IAM-represented employees was "non-negotiable."

In a similar vein was an October 29, 1982 memorandum addressed "To All Managers," which Qantas representatives instructed be posted and circulated to all employees. The memorandum stated:

> So far as the U.S. employees are concerned, *they are offered the option of accepting the Company's determination to contract-out and receive whatever severance package the IAM may negotiate, or oppose the Company's determination to contract-out and thus decline any severance payment.*
>
> Negotiations about the consequences of contracting-out work in the U.S. *will continue* with the IAM, if the IAM will notify the mediator of its desire to continue.
>
> (A. 29-30, emphasis added)

Qantas' chief negotiator admitted that the statement was an accurate reflection of what Qantas was telling the IAM at the negotiating table. This statement, just as that of Qantas' CEO, expressed clearly and forcefully that Qantas' approach to the negotiations was to bargain only about the terms of the severance package which might be made available to employees and that there would not be any meaningful negotiations over the *decision* to contract out.

Thus, after months of negotiations throughout which Qantas was expressing its firm resolve to achieve contracting out, its statements were clearly and definitely informing the IAM that the primary issue of contracting out was *not* to be subject to meaningful negotiation. Qantas, through its Chief Executive Officer and in written statements, made it clear that its entire approach was to convince the IAM that it would not in fact consider anything less than 100% contracting out, and that the matter was not negotiable. It is this approach which fails to comport with the RLA's requirements to "exert every reasonable effort to make and maintain agreements." The

validation of this approach by the Court of Appeals was plainly improper.

B. Qantas Took Steps That Would Economically Make It Difficult To Alter Its Proposal

The District Court also found that Qantas' revenues from performing airport ground handling services for another carrier, Singapore Airlines, were quite substantial and essential to Qantas' economic well-being and to potential alternatives to contracting out (A. 22, Findings of Fact 100). However, from the commencement of the negotiations in the spring of 1982, Qantas informed the IAM that it "had no intention of seeking new outside business or retaining current contracts because of the inherently unreliable nature of that business, unless the Union could develop new ways of reducing costs." (A. 10, Finding of Fact 40) This was consistent with its resolve to totally cease doing any self-handling and to contract out the work being performed by IAM-represented employees.

As part of its decision to cease handling "outside" carriers and contract out the ground handling work, Qantas actively sought contractors to perform the bargaining unit work and also informed Singapore Airlines of its desire to cease doing ground handling work for Singapore. Thereafter, in August, 1982, while negotiations were continuing, Qantas tentatively selected Servair, Inc. to perform the work being done by IAM-represented employees (A. 20, Finding of Fact 88). At that same time, "Qantas agreed to reimburse Servair for its start-up costs if, as a result of the pending negotiations, or for other reasons, Qantas did not engage Servair to perform its ground handling work." (A. 20, Finding of Fact 88)

The District Court found that after selecting Servair, "Qantas attempted to persuade Singapore that, in the event Singapore chose to terminate its agreement with Qantas, it should also contract with Servair, because Qantas would thereby get a better price from Servair." (A. 22, Finding of Fact 96) Thereafter, Singapore Airlines, a major source of revenue for Qantas and an essential element in any alternative to contracting out, did indeed terminate its contract with Qantas and choose Servair to do its ground handling work in San Francisco. Thus, Qantas' attempts to "persuade" Singapore to sign a contract with Servair, *thereby achieving a better deal between Qantas and Servair* was a successful one. The obvious result however, was to place Qantas in a position where a major source of its revenue was eliminated, thus limiting its flexibility in its negotiations with the IAM and making it economically difficult to move from its "non-negotiable" position.

C. Qantas Failed To Provide The Union With Relevant Information

The District Court found that the IAM "was provided with all information requested." (A. 9, Finding of Fact 33) However, this finding is clearly erroneous. To the contrary, it was *undisputed* that certain financial information was concealed from the IAM on the baseless ground that a "formal" request had not been made and that Qantas believed that the Union may have already been in the possession of the information. In this regard, Qantas had studied the financial consequences of what was termed an "Optimum Situation," which was based on the ability of the Company to implement a complement of part-time employees, increased cross-utilization of employees in different classifications and other cost-savings measures.

When the IAM asked to see those studies, Qantas simply failed to produce them. The testimony of Qantas' chief negotiator on this subject was undisputed.

> Q. Where Mr. Van Zant said, "Let us see your studies," did you produce the studies?
>
> A. I didn't take that as a formal request. Again we thought from specific words that we used previous times that they actually either had or were aware of what was going on; and thought we had something up our sleeve and he was saying, let's have what's up your sleeve. That's my recollection of this.

Thus, Qantas concealed certain financial information from the IAM in order to insure that the IAM would not be fully "aware" of possible alternatives and to maintain the appearance that the Company would not consider negotiating with regard to its decision to contract out.

II

THE APPROACH OF QANTAS WAS VIOLATIVE OF THE RLA OBLIGATION TO EXERT EVERY REASONABLE EFFORT TO MAKE AND MAINTAIN AGREEMENTS

The RLA, 45 U.S.C. § 151, *et seq.*, states at § 152 First that:

> It shall be the duty of all carriers, their officers, agents and employees *to exert every reasonable effort to make and maintain agreements* concerning rates of pay, rules and working conditions, and to settle all disputes, whether arising out of the application of such agreements

> or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

This Court has stated that this duty is "the heart of the Railway Labor Act." *Chicago and North Western Ry. Co. v. United Transportation Union*, 402 U.S. 570, 574, 91 S.Ct. 1230, 29 L.Ed.2d 192 (1971).

It is important to note that the obligation to bargain under the RLA is greater than that under the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151, et seq. See, e.g., *Japan Airlines Ltd. v. International Association of Machinists*, 389 F.Supp. 27, 34 (S.D. N.Y. 1975) *aff'd*, 538 F.2d 46 (2nd Cir. 1970); *REA Express v. Brotherhood of Railway, Airline & Steamship Clerks*, 358 F.Supp. 760, 772 (S.D. N.Y. 1973); *Erie Lackawanna Ry. Co. v. Lighter Captains Union Local 996*, 338 F.Supp. 995, 968 (D. N.J. 1972).

The more stringent bargaining requirement of the RLA is derived from the fact that a disruption caused by a strike in the transportation areas generally has more impact than in other areas, *Detroit & Toledo Shore Line Ry. Co. v. United Transportation Union*, 396 U.S. 142, 149, 90 S.Ct. 294, 24 L.Ed.2d 325 (1969), and is reflected in the long and drawn out bargaining procedures of the RLA, the three different status quo requirements of the Act, and the fact that mediation is a mandatory requirement under the RLA before self help can be exercised.

Clearly the RLA requirement to "exert every reasonable effort" requires more than "take it or leave it" or "purely formal" negotiations. This Court has said, in interpreting the NLRA, that it is not enough to negotiate with a "predetermined resolve not to budge from an initial

position." *NLRB v. Truitt*, 351 U.S. 149, 154-55, 76 S.Ct. 753, 100 L.Ed. 1027 (1956) (Frankfurter, J., concurring).[2]

In the present case, the undisputed record evidence did not support the District Court's finding that Qantas met its obligations under the RLA. The District Court found that Qantas had exerted "every reasonable effort" to reach an agreement despite having been presented with strong evidence that Qantas' approach to the negotiations was to establish an unyielding position and then take actions which cemented that position by making it economically unfeasible to seriously consider other alternatives. This approach does not comport with the RLA's requirements to "exert every reasonable effort to make and maintain agreements."

Can a carrier take the position that their intent to contract out bargaining unit work is "non-negotiable," withhold relevant information that might give a union a different idea, and then take steps to make it economically difficult to back out of that position? Petitioner asserts that the duty "to exert every reasonable effort" under the RLA requires far more. The Court of Appeals' endorsement of Qantas' approach to the negotiations results in little or no meaning being given to the important statutory language involved here.

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[2] While courts have frequently used National Labor Relations Act cases for guidance in interpreting the RLA, see, *e.g., Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 377, 383-84, 89 S.Ct. 1109, 22 L.Ed.2d 344 (1969), this Court has cautioned that parallels between the RLA obligation to "exert every reasonable effort" and the National Labor Relations Act obligation to "confer in good faith," "should be drawn with full awareness of the differences between the statutory schemes." *Chicago and North Western Ry. Co. v. United Transportation Union, supra*, 402 U,.S. at 579.

As this Court has stated, a "finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 92 L.Ed. 746 (1948). In order for a court's findings to be upheld, they must be supported by all of the legally relevant evidence and the court's view of that evidence must be held to be a "permissible" one. *Anderson v. City of Bessemer City, North Carolina.* 470 U.S. ___, 106 S.Ct. ___, 84 L.Ed.2d 218 (1985).

Petitioner submits that given the undisputed circumstances surrounding the negotiations in this case, it cannot be said that Qantas "exerted every reasonable effort" to reach an agreement with the IAM. Qantas' statements regarding the non-negotiability of its contracting out proposal, the actions taken by it to lock it in to that position, and its failure to provide certain relevant information simply do not support the finding that "every reasonable effort" was exerted in this matter. A party steps over the line of permissible behavior when it takes the approach taken by Qantas in this case. Therefore, Petitioner respectfully contends that the Court of Appeals erred when it ruled that the District Court's finding that Qantas did not fail "to exert every reasonable effort" to reach an agreement was not clearly erroneous.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

Filed
July 31, 1984
William L. Whittaker, Clerk
U.S. District Court
No. Dist. of CA

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,

Plaintiff,

vs. NO. C-83-0623 SW

QANTAS AIRWAYS, LTD.,

Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT

1. Since 1957, the International Association of Machinists ("IAM") has been the certified bargaining representative for employees of Qantas Airways, Ltd. ("Qantas") in classifications of airline mechanics, ramp employees and stores employees. Since that time, the IAM and QANTAS have been parties to successive collective bargaining agreements covering those classifications. The most recent of those collective bargaining agreements is commonly referred to as the "Blue Book."

2. Since 1965, the IAM has been the certified bargaining representative of the Qantas employees in classifications of office, clerical and passenger service employees, and has been a party to successive collective bargaining agreements with Qantas covering those classifications since that time. The most recent of those collective bargaining agreements is commonly referred to as the "Red Book."

3. The Blue and Red Books each had a stated term beginning April 1, 1979 and ending March 31, 1982.

4. Plaintiff is a labor organization representing many employees in the airline industry, as well as in industry generally.

5. Defendant, Qantas Airways, Ltd., is a corporation organized under the laws of Australia, authorized to do business and doing business in the United States, including San Francisco, California. Defendant is now and at all times material to this action has been an air carrier engaged in the business of providing air transportation in interstate and foreign commerce. Qantas is a "common carrier by air engaged in interstate or foreign commerce" as defined by Section 201 of the Railway Labor Act, 45 U.S.C. Section 181; Qantas is an agency or instrumentality of a foreign state as defined in 28 U.S.C. Section 1603(a) and operates in the United States under a foreign air carrier permit issued pursuant to Section 402 of the Federal Aviation Act, as amended, 49 U.S.C. Sections 1031-1542. Qantas and the IAM, insofar as it represents Qantas employees, are subject to the provisions of the Railway Labor Act.

6. In 1982, Qantas did its own ground handling in Honolulu and San Francisco. During that period, Qantas basically operated one flight per day between Sydney and San Francisco via Honolulu.

7. In 1982, Honolulu and San Francisco were the only stations in the world outside Australia where Qantas did its own ground handling.

8. In order to recover some of the costs of self-handling in Honolulu and San Francisco, Qantas performed ground-handling for other carriers. Qantas' two principal customers were Wardair and Singapore Airlines.

9. In the two previous negotiations to the 1982 negotiation (in 1976 and 1979) the Company had proposed changes in the agreements which would have permitted it to contract out much of the work which it was currently doing with its own employees. The main reason for such proposals was the cost of getting the necessary ground-handling work done with Qantas' own employees was greatly in excess of what it would cost to have that work done by independent contracting companies.

10. In 1976 and 1979, the Union opposed any change in the agreements which would permit contracting out. Qantas ultimately withdrew its proposals to contract out work at existing stations. The parties then negotiated some changes in the work rules provided by each agreement in exchange for increased pay and benefits, including increased job protection for IAM-represented employees.

11. Early in 1982, Qantas determined that the cost of self-handling exceeded by more than $2,500,000 a year what it would cost to have that work done by independent contracting companies, even after the costs of its own ground handling were reduced by revenues which it received from handling flights for other carriers.

12. Qantas determined that in the event it lost its ground-handling contract with Singapore Airlines costs for self-handling would exceed the cost of contracting-out by more than $5,000,000 annually.

13. In November of 1981, Personnel Director for the Americas, Feil recommended that the Company not propose contracting-out, in part because a strike of some length might occur before the Company could achieve its objective.

14. In a memorandum dated November 6, 1981, Senior Vice-President Howling recommended to Deputy Chief Executive and Chief Operating Officer Ronald Yates that Qantas "not attempt to obtain full or partial contracting out of San Francisco and Honolulu Airports" to avoid the financial risks of a strike.

15. A memorandum summarizing a meeting in Sydney on November 18, 1981, attended by Messrs. Yates, Howling, and Feil, C.W. Porter, Director of Personnel and Peter Brooks, Contract Sevices Manager, states:

> "Our continuing long term objectives should be to contract out ground handling work at SFO and HNL if it can be achieved without a strike by IAMAW employees."

16. Early in 1982, Mr. Yates decided Qantas should consider risking a strike in order to achieve the enormous cost savings which could be achieved through contracting-out. In a meeting on February 15, 1982 in San Francisco, after obtaining advice that contracting-out was a legal objective, Mr. Yates stated that the Company's goal was:

> "(a) to eliminate all self handling at San Francisco and Honolulu Airports as it has done in all other locations outside Australia, and (b) to continue contracting out ground handling at Los Angeles Airport."

17. At the February 15 meeting, Mr. Gartner, attorney for Qantas, stated that there was a reasonable likelihood of success in achieving at least some contracting-out of work

without a strike, provided that the Company offered substantial severance pay and that it was possible to make alternative provisions for a significant number of employees (*e.g.*, early retirement, redeployment, employment by the contractor). He added, however, if the Company was unsuccessful in obtaining partial contracting-out in negotiations and a strike occurred over that issue, there was no reason apparent at that time why Qantas should not "go for broke" and plan to contract out all the handling work.

18. It was further decided at the February 15 meeting that no proposals which would be inconsistent with proposals seeking the right to contracting-out the airport handling work be submitted at that time.

19. The next day, Yates again made it clear to Feil that the contracting-out objective was no longer subject to being achieved without a strike and that the Company would seriously consider the option of taking a strike in order to reduce the costs of airport operations at Honolulu and San Francisco.

20. At a regular meeting on February 24, 1982, Qantas' Board of Directors approved the Company position for the forthcoming IAM negotiations as outlined in a memorandum edited and signed by Keith Hamilton, The Chief Executive of Qantas. In that memorandum, which was dated February 23, 1983, the Company's position was summarized as follows:

> "Management intends to take a very firm stance in the forthcoming negotiations with the IAMAW to achieve the following objectives.
>
> (1) To obtain the right to contract out all airport handling work at Honolulu and San Francisco plus any future airport to which the Company may operate in the United States.

> To continue contracting out airport handling at Los Angeles.
>
> As negotiations proceed, changes to the Company's position may become desirable. Should the Company ultimately accept a modified position in the negotiated agreement, the initial aggressive proposals will allow for greater leverage during negotiations."

The memorandum also stated that, in light of the requirements of the Railway Labor Act, a strike was unlikely prior to July 1982 and that therefore "opportunities exist for the company to vary its position."

21. On February 25, 1982, Qantas notified the IAM, of its desire to amend the current collective bargaining agreements. It proposed to revise the contracts "to permit contracting out at all airport locations" of work performed by employees covered by the two collective bargaining agreements. A letter from Howling, transmitting Qantas' proposals, described the high cost incurred by Qantas in handling its limited flight operations at San Francisco and Honolulu and concluded:

> "In the forthcoming negotiations we will be discussing with you the seriousness of the problem confronting Qantas and the employees represented by your organization."

22. Qantas also proposed an amendment to the severance pay provision of the agreements which would provide that laid off employees would not receive severance pay if:

> "h. Notice of intended change in this Agreement has been given in accordance with Section 6 of the Railway Labor Act and the provisions of the Act with respect to efforts to reach agreement

following such notice have been fulfilled, without agreement."

23. On February 26, 1982, IAM notified Qantas pursuant to Section 6 of the Railway Labor Act, 45 U.S.C. Section 156, of its desire to amend both agreements. The IAM proposed 94 amendments to the collective bargaining agreements. The 94 IAM proposals which would have resulted in increased costs to Qantas were formulated before the Union was aware of Qantas' proposals.

24. On March 1, 1982, Mr. Thomas, the chief negotiator for the Union, in a written statement to the Union members, said with respect to the forthcoming negotiations:

> "If the concessions made to Qantas Airways in past negotiations are considered by Qantas management to be such that they cannot operate in this sector of the world in the *mutual interest* of the Company and its employees, let *them* depart from the American scene totally." (Thomas, March 20, pp. 21-22, D-17).

25. On March 8, 1982, the Company gave a brief explanation of its proposals to contract out the airport work and the reasons for them, stating that the excessive cost associated with self-handling was the reason for its position.

26. On March 8, 1982, in response to a specific question, Gartner told the Union committee that the Company's contracting-out proposals were "negotiable". He stated, in substance, "We are here to negotiate. We don't have to give up anything. But we will listen and talk."

27. On March 8, 1982, the Company explained to the Union, that, under its proposal, if the parties did not reach an agreement there would be no entitlement to severance pay by the employees. The Union clearly understood the Company's intention.

28. From March 8 to March 11, 1982, the Union explained and discussed its 94 proposals. The Union did not propose an increase in the ratio of part-time employees in the first week of negotiations. The Union's proposals with respect to part-time ratios would have *reduced* the part-time rations in the agreements, further restricting the use of part-time employees by the Company. From March 9 through April 8, the Union made no specific proposal for cross-utilization.

29. On March 11, 1982, Thomas insisted that the Company bargain on the Union's 94 proposals and said that the Union would bargain on the Company's 6 proposals. Before recessing on that date, the Company's chief spokesman, (Feil) expressed the hope that the Union committee would come prepared to address itself to the Company's proposals, when the negotiations resumed on March 30, 1982 for a scheduled two weeks of meetings.

30. During the March 11-30 recess, the Union negotiating committee did nothing to address itself to the Company's proposals in preparation for the resumption of negotiations.

31. On March 30, 1982, the Company gave a detailed financial explanation of the economic and business reasons for its proposal to contract out the airport work, again clearly indicating that the excessive cost associated with the self-handling of the airport work was the basis for its position. The Company provided the Union with a broad range of economic data concerning the comparative costs of self-handling versus contracting-out, including break-downs of staff members by classification and station, existing airport costs of manpower, equipment, rental of terminal facilities, light, heat, power and contract cleaning and recoveries from other airlines as opposed to the

estimated costs of contracting-out. Feil told the Union committee that Mr. Chapman was there for the express purpose of answering any questions about the economics of the Company's proposals, and invited such questions.

32. On March 30 and 31, 1982 the Union requested information with respect to the charts and figures provided by Chapman. Among other things, the union requested a breakdown between the savings at Honolulu and the savings at San Francisco as a result of contracting-out which, in total, was $2.5 million. The union received the requested information.

33. The Union requested, and the Company provided it with, information as to group insurance contracts, Qantas' ground-handling contracts with Singapore and Wardair, crew costs, fuel costs, landing fees and mandatory payments of FICA and unemployment taxes. The Union was provided with all information requested.

34. The Union was informed that the savings in San Francisco would be approximately $2.08 million and in Honolulu would be approximately $.45 million.

35. The Union made written requests to the Company for information on the pension plan and on the medical insurance plan, and received the requested information.

36. A Qantas staffing study showed that, at existing costs, Qantas would have to pay $3 million more for a so-called optimum staffing plan than it would cost to contract-out. To eliminate that $3 million excess, a pay cut of approximately 50% would also be necessary. On April 1, 1982, therefore, Gartner asked the Union, in substance, "Would it do any good to base a study on part-timers doing the work and receiving 50 percent of the wages?" The Union made no response to that question. Feil did not cut off any possible response by the Union, but observed that —

as the optimum staffing study had shown — even a fully part-time staff would not be competitve on the basis of cost.

37. On April 1, Gartner told Thomas that the Union had the figures necessary to conduct its own study on optimum staffing, but that Qantas could still get the work done for less by contracting-out.

38. On April 2, 1982, the Company proposed a "Special Severance Pay Agreement" for the employees affected by the proposed contracting-out of the airport work.

39. On April 2, Feil stated, in substance, "During the week of March 8, the Company explained its proposal concerning the severance pay provisions. It deals with what would happen in the event the parties could not bring about a settlement. We sincerely hope the company does not find it necessary to implement such a proposal. . . . "

40. On April 6, 1982, Feil stated that the Company had no intention of seeking new oustide business or retaining current contracts because of the inherently unreliable nature of that business, unless the Union could develop new ways of reducing costs. Mr. Feil stated that the Company had tried but could not achieve that goal.

41. On May 17, Thomas stated that although the Union was willing to discuss the problem, it was unwilling to discuss the Company's means of solving the problem. In response to a tentative suggestion by the Union that the parties "explore" cross-utilization, Gartner asked Thomas for specific proposals on cross-utilization. The union failed to present any; instead, Thomas insisted that the Company come up with alternatives to its own proposals.

42. During the period from March 8, 1982 to May 18, 1982, the IAM did not make a single alternative proposal to contracting-out (either in the form of an increased part-time ratio, cross-utilization or in any other form), instead

insisting that the Company propose an alternative to its own proposal. During that period, the Union declined to discuss the issue of severance benefits for the affected employees, refused to consider Qantas' proposal regarding such benefits, and insisted on discussing its 94 proposals.

43. On May 18, the Company stated that the parties were at an impasse. The Union disagreed. Direct negotiations broke off and the Company stated that it would ask the help of the National Mediation Board.

44. Applications for mediation were submitted by the IAM and Qantas to the National Mediation Board on May 25 and May 26, 1982, respectively. Subsequently, the NMB assigned one of its mediators, Samuel Cognata, to mediate the disputes.

45. On July 20, 1982, Mediator Cognata met separately with the Company representatives and with the Union committee. On July 21, 1982, Mediator Cognata met with the Union committee.

46. On July 22, 1982, Mediator Cognata convened the first joint mediation session. Subsequently, joint mediation sessions were held with Mr. Cognata on July 23, August 10, 11, 12, and 13, September 22 and 23. Most of those meetings were devoted to a discussion of the Union's non-economic proposals. Tentative agreement was reached on a number of those proposals.

47. On July 23, 1982, the Company offered to provide an "Outplacement Job Search Program" for full time employees with more than five years service whose jobs were discontinued as a result of contracting-out.

48. On July 23 and again on August 10, Mr. Cognata suggested that the Union *assume, without agreeing* to the Company's proposals, that contracting-out would take place, and negotiate on acceptable benefits for the

employees in the event that it did take place. The Union refused to take part in even a hypothetical discussion of contracting-out.

49. On August 10, the Company presented an 8-point plan which, among other things, included a suggestion for a staggered phaseout of self-handling, and a plan to allocate a number of positions to affected Qantas personnel with the ground-handling companies with whom Qantas was negotiating.

50. On August 11, Gartner, in response to Thomas' statement that he would be requesting transportation to Australia to meet with Qantas top management, stated to the Union committee, in substance "If you have any proposal to make, make it to us. We're empowered to negotiate any changes."

51. On August 11, Thomas asked the Company for free transportation to Australia for himself and Louis Schroeder, President of District 141, so that they could talk to top management of Qantas.

52. On August 13, Qantas refused the request, but stated that Yates, would be in San Francisco in the near future and would be willing to meet with Thomas and Schroeder. After the Mediator declared a recess on August 13, Qantas arranged a meeting in San Francisco, on September 13, 1982, between Messrs. Schroeder, Thomas, Yates and Feil.

53. Although Schroeder and Thomas requested the meeting of September 13, 1982, they made no proposal to Yates and had prepared no proposals prior to the meeting. Thomas testified that he and Schroeder sought the meeting with Yates because he "hoped that there could be a meeting of the minds for something less than 100% contracting-out". Schroeder testified that he hoped to persuade Yates to abandon the contracting-out proposal. They had no specific

offer, however, of how much less than 100% contracting-out they were willing to talk about.

54. Yates was aware that the Union's purpose in asking to meet with him was to determine whether the Company's contracting-out proposal was a "hard" or "soft" proposal; he therefore told the Union representatives that the Company's position on contracting-out to save excess costs was "non-negotiable." Yates did not state to the Union representatives that the Company would not consider any cost-saving counterproposal. Schroeder testified that, after his meeting with Yates, he knew that the Company was taking "a very hard position about its desire to contract out".

55. Both before and after the meeting of September 13, 1982, the Company repeatedly stated at the bargaining table that it would be willing to listen to cost saving alternatives to contracting-out. When on January 19 the Union finally did propose an alternative, the Company examined it carefully and attempted to discuss it. There is no evidence indicating that Qantas would not have seriously considered other such proposals had they been made.

56. Meetings of the two negotiating committees, with the assistance of the mediator, continued on September 22. On September 23, 1982, the Company withdrew its proposal for an Out-placement Job Search Program and proposed a new severance benefits package providing for increased severance pay and travel privileges for the employees who would be terminated as a result of contracting-out.

57. On September 23, 1982, in a meeting with Cognata, Feil and Gartner, Thomas asked for a recess in the sessions which were scheduled to continue the following day. He said that he had to go to Washington, D.C. to consult with the officials of the IAM to try to obtain authority to

negotiate about the Company's six proposals. Thomas stated that he would report back within the next ten days, and that if the Union refused to give him such authority, he would report that refusal to the Mediator and there would, therefore, be no need for further mediation. Thomas testified that it was not true that he had to go to Washington to get authority, but that he wanted to go to Australia, and lied to conceal his true purpose.

58. On September 27, 1982, in response to the Mediator's request that the Company put its complete economic package on the table, the Company proposed a wage increase for the non-airport clerical employees.

59. Both negotiating teams were in San Francisco on December 1 and 2, 1982, but no joint meetings took place. The Union officially rejected the Company's last proposal and had no counterproposal.

60. On December 2, 1982, the Company submitted another severance benefits package proposal to the Union, providing increased benefits for any terminated employees.

61. On December 23, 1982, the NMB acknowledged its failure to bring the parties to agreement and pursuant to 45 U.S.C. Section 155, First, proferred arbitration to the parties.

62. On January 1, 1982, the IAM, by letter of William W. Winpisinger, International President, declined the NMB's proffer of arbitration. The Company did not accept the NMB's proffer of arbitration.

63. At a meeting of Local Lodge 1213 on January 5, 1983, Thomas reported to the members that the legal department of the IAM was working on a lawsuit and that chief counsel Joseph Manners was highly optimistic about the possibility of stopping Qantas from implementing its proposals to contract out the airport work.

64. On January 6, 1983, the NMB notified Qantas that the IAM had declined its proffer of arbitration, and notified the parties that its mediatory efforts had failed and that, in accordance with the provisions of the RLA, the parties were required to maintain the status quo for the thirty days beginning January 7, 1983.

65. During the period of mediation beginning on or about July 21, 1982 through January 6, 1983, the Union refused to discuss Qantas' proposals to contract out all of the airport work, but did not introduce a single cost-saving alternative proposal to contracting-out, declined to discuss the issue of severance benefits and refused to discuss Qantas' proposals regarding such benefits.

66. On January 7, Howling, wrote to the airport and non-airport employees. Howling gave an account of the negotiations, noting that the Company had repeatedly stated to the Union that the reason for its contracting-out proposals was the millions of dollars that would be saved annually through contracting-out, and that the Company had repeatedly invited alternative cost saving proposals from the Union. Howling also stated that, if no agreement was reached, the severance pay for which provision was made in the expired agreements in the event of layoff would not be payable.

67. On January 10, 1983, Feil wrote to the IAM suggesting that the parties use as much of the thirty-day period as possible in continued attempts to reach agreements, and invited the IAM to resume negotiations on January 19, 1983. In that letter, the Company urged the Union to "address itself to the specific terms of the severance package offer . . . made on December 2, 1983," and stated, with respect to the machanics agreement:

> "Although the Union Committee has not made any alternative proposals tc contracting out, with respect to the airport work in question, which will result in cost savings comparable to what will be achieved by contracting out, Qantas remains willing to consider any such proposal."

and stated, with respect to the clerical agreement:

> "The Union is also free to make alternative proposals with respect to performance of the work which is done by this group which will result in comparable cost savings without contracting-out."

68. In the January 10 letter, Feil reiterated the Company's position, previously expressed during the negotiations, that the Company had no intention of contracting-out the non-airport work. He invited the Union to draft and present for agreement language which would give that assurance.

69. On January 11, 1983, Thomas wrote to Feil agreeing to meet with the Company.

70. On January 12, Feil replied to Thomas, urging him again to address himself to the Company's proposals.

71. On January 19, 1983, meetings of the two negotiating committees resumed and the Union, for the first time, made a proposal which it stated would save the Company over $2 million annually. The Union also maintained that its proposal would result in the elimination of approximately 53 jobs.

72. On January 19, Gartner stated that the Company was willing to enter into an agreement not to contract out the non-airport jobs for the life of the agreement and that it was amending its proposals to that effect.

73. On January 20, 1983, the Company reported to the Union committee that its calculations indicated that the Union's proposal would not save the $2 million annually that the Union claimed it would, but would save only approximately $500,000 and asked the Union for further explanation. The Union, instead, withdrew it proposal and refused to discuss it further. At about noon of January 20, Thomas ended the meeting and led the Union negotiating committee out of the room, although the Company committee offered to remain in continuous sessions for the next 15 days. Thomas' response to this offer was "If you have any alternatives, call my office."

74. Non-statutory mediation sessions were held by the NMB from February 1 through February 4, 1983; Board Chairman Robert Harris and Mediator Robert Brown represented the Board.

75. On February 1, 1983, Thomas stated, in substance, that the Union would not agree to the Company's contracting-out proposals in "any way, shape, or form."

76. On February 3, 1983, the Company made two separate final proposals, one for the mechanics group and one for the clerical group, each of which included a greatly increased severance benefits package for the employees to be terminated.

77. After February 3, 1983, the mediators did not convene any joint sessions. On February 4, 1983, the parties met separately with Mediator Brown and with Board Chairman Harris. From February 1 through February 5, 1983, the Union did not resubmit its January 19 proposal, did not provide any further detail or explanations of that proposal, and did not make any other proposals.

78. On February 6, 1983, after the cooling-off period had expired, Qantas implemented its proposal to contract

out the airport work in Honolulu and San Francisco and terminated approximately 230 employees who had been performing that work. Qantas also implemented its proposal to eliminate any provision for severance pay in the absence of any agreement.

79. Throughout the negotiations, Qantas was willing to negotiate with the Union on the contracting-out decision *and* on its effects. Although the Company negotiating team was instructed to take a "firm stance" in the negotiations, its instructions made clear that the Company was flexible and would modify its position should that become desirable in the course of negotiations. The Company negotiating team was in fact flexible.

80. The Company considered and might have agreed to a proposal to contract out the airport work in San Francisco only and to retain self-handling in Honolulu, if it had been made by the Union during negotiations, and if the Company had believed that such an agreement would have precluded a strike.

81. Although the Company did not directly communicate this "fallback" to the Union, the figures provided by the Company showing the relatively much greater net cost of the airport work in San Francisco compared with Honolulu indicated that the Company would entertain such a proposal. Thomas testified that by looking at the Chapman study he got the "hint" that the Company might be amenable to a proposal to retain self-handling in Honolulu. Thomas did nothing about that hint. Halliday also believed that it would be easier for the Union to make proposals which would save the jobs in Honolulu than it would be to save the jobs in San Francisco.

82. The cost figures provided to the Union on January 19 showed a savings of some $3.5 million under the

Blue Book and $1 million under the Red Book — thus giving an indication that the Company might be willing to contract out the Blue Book work only. On January 25, 1983, Thomas expressed the view to Scheri that the Company would be amenable to a proposal to contract out the "Blue Book" only and, on January 27, Thomas expressed this same view to Halliday. Halliday agreed with this view (*id.*) Although the "hints" of Company flexibility implicit in the Company's breakdown of cost savings were received by the Union, the Union never made those proposals.

83. There is no evidence that either before or after the commencement of negotiations, but prior to February 6, 1983, Qantas made an irrevocable decision to contract out all of its airport handling work in San Francisco and Honolulu, or that Qantas refused to bargain over the decision to contract out the work, or that Qantas engaged in "surface bargaining." Nor is there evidence that the Company deliberately misled the Union as to the existence of economically equivalent alternatives to contracting-out for the purpose of discouraging meaningful negotiations.

84. Aside from some tentative suggestions that the parties "explore" cross-utilization at the beginning of negotiations, the Union did not respond to the Company's request for cost-saving alternative proposals until January 19, 1983; instead, the Union continuously insisted that the Company come up with alternatives to its own proposals. The Union committee never "explored" cross-utilization and never made any concrete proposal on the subject until January 19, 1983. When the Company attempted to analyze and discuss the January 19 Union proposals, the Union withdrew them.

85. Plaintiff has failed to show that if the Union had presented the Company with concrete alternative cost-

saving proposals, the Company would have refused to consider them. The Company was interested in reducing its costs and would have considered any proposal which would have accomplished that goal, particularly if it would have avoided the risk of a strike. The Union's efforts were concentrated on trying to get the Company to submit alternative proposals for the Union to consider, rather than on making such proposals for the Company to consider.

86. Throughout the negotiations, the Union made it clear to the Company that it was totally opposed to the concept of complete contracting-out.

87. Qantas did not make any commitment to Servair, Inc. before February 6, 1983 which removed its ability to accept any resolution to the negotiations other than contracting-out.

88. In August, 1982, Qantas tentatively selected Servair as contractor to perform the airport work, other than cargo work, if and when such airport work was contracted out. At or about the same time, Qantas agreed to reimburse Servair for its start-up costs if, as a result of the pending negotiations, or, for other reasons, Qantas did not engage Servair to do its ground-handling work.

89. In August 1982, after Singapore Airlines entered into a ground-handling contract with Servair in San Francisco, Qantas and Servair, Inc. entered into an informal lease agreement whereby Servair agreed to pay a fixed price for the use of Qantas equipment for each Singapore flight thereafter handled by Servair.

90. On October 1, 1982, Qantas and Servair signed a formal lease agreement confirming their previous informal agreement in which Qantas agreed to provide ground-handling equipment to Servair to handle Singapore flights, for a fee of $250 per Singapore service. From October 1,

1982 to February 6, 1983, Servair paid Qantas a total of more than $20,000 for the use of Qantas equipment.

91. On January 21, 1983, Patrick Deasy, Vice President, Marketing, for Servair, wrote to Qantas enclosing purchase orders for Qantas equipment at San Francisco and Honolulu, and stating that Servair "will assume ownership of the equipment at 001 hours on the 6th of February, 1983, unless otherwise changed by you."

92. On February 7, 1983, Qantas signed contracts for the performance of its ground-handling work in Honolulu and San Francisco with Servair, Inc. after last minute negotiations under the pressure that Qantas had already terminated the employment of those employees who had previously done the work and that Qantas had to rely on Servair to continue to do that work which it had begun to do, on February 6, 1983.

93. Qantas' ground-handling equipment was sold to Servair on February 7, 1983. The purchase price for the equipment was $1,380,000.

94. Qantas did not induce Singapore Airlines to cancel its contract with Qantas, thereby limiting Qantas' flexibility in negotiations.

95. Prior to receiving notice of cancellation from Singapore on July 28, 1982, Qantas attempted to allay Singapore's fear of a strike and to retain Singapore's ground-handling. Qantas assured Singapore that in the event of a strike its contingency plans would provide for continued handling and attempted to get Singapore to give Qantas authority to act on its behalf or to participate jointly in negotiations with potential handlers to provide for that contingency. Singapore refused to agree to either of these suggestions and conducted its own survey of potential ground-handlers.

96. After Qantas had tentatively selected Servair, Qantas attempted to persuade Singapore that, in the event Singapore chose to terminate its agreement with Qantas, it should also contract with Servair, because Qantas would thereby get a better price from Servair.

97. On July 26, 1982, the recommendation of Singapore officers was that Singapore enter into ground-handling contracts with Servair in San Francisco and with CP Air in Honolulu.

98. The selection of CP Air in Honolulu rather than Servair, which would have been more advantageous to Qantas, is further evidence that Singapore acted independently of Qantas and in its on interests.

99. On July 18, 1982, Singapore Airlines gave Qantas notice of termination of its ground-handling contracts, and requested that Qantas agree to a shortened 30-day notice period. Qantas, however, insisted on the full 60-day notice making the termination effective October 1, 1982.

100. Qantas' revenues from handling Singapore were approximately double its own revenues in San Francsico ($2,044,000 as against $1,102,000) — indicating that Singapore was acting in its own interest and not in conjunction with Qantas. Whatever the ultimate resolution of the IAM negotiations, it was clearly in Quantas' economic self-interest to retain Singapore's handling as long as possible

101. Qantas sent various written communications to its employees informing them of the status of the negotiations between Qantas and the IAM and responding to employees' questions, including inquiry about their right to resign from the Union. Qantas did not misrepresent the Union's bargaining position in its communications.

102. There is no evidence that Qantas bargained directly with its employees or that it encouraged, induced or assisted employees to resign from the Union.

103. There is no evidence that Qantas disciplined or terminated any employee for joining and assisting the IAM, or that it threatened employees with loss of employment for joining and supporting the IAM.

104. There is no evidence that Qantas manager Edith Henchey disciplined employee Irene Hall because she "joined, assisted and was elected to IAM local office."

105. There is no evidence that Qantas terminated the employment of Brian Rodriguez because he joined and supported IAM.

106. There is no evidence that Qantas hired individuals to be replacements for the employees who might strike.

107. There is no evidence that any Qantas surveillance of IAM officials and members was for the purpose of or had the effect of interfering with, restraining or coercing IAM-represented employees in their union activity.

108. There is no evidence that Qantas threatened or coerced IAM officials or members during the negotiations.

109. There is no evidence that Qantas discriminated against IAM officials or members because of their union activities.

CONCLUSIONS OF LAW

1. Qantas is an instrumentality of a foreign state as defined in 28 U.S.C. Section 1603(a).

2. This court has jurisdiction of this action under 28 U.S.C. Section 1330. *McKeel v. The Islamic Republic of Iran*, 722 F.2d 582 (9th Cir. 1983); *Goer v. Compania*

Peruana de vapores, 688 F.2d 417 (5th Cir. 1982); *Houston v. Murmansk Shipping Co.*, 667 F.2d 1151 (4th Cir. 1982); *Rex v. Compania Peruana de vapores, S.A.*, 660 F.2d 61 (3rd Cir. 1981), *cert. den.*, 102 S.Ct. 1971 (1982); *Ruggerio v. Compania Peruana de Vapores*, 639 F.2d 872 (2nd Cir. 1981).

3. Section 2, First of the Railway Labor Act ("RLA"), 45 U.S.C. Section 152, First required both Qantas and the IAM to exert every reasonable effort to make agreements concerning rules of pay, rules and working conditions.

4. The subject of contracting-out is a mandatory subject for bargaining under the RLA.

5. An employer who wishes to contract out is under a duty imposed by Section 152, First to indicate its desire to contract out and stand ready to listen to and consider the Union's opposing arguments and counterproposals, if any.

6. The Act's requirement that parties make every reasonable effort to make agreements does not require a carrier to continue a part of its business which costs it substantially more annually than necessary. It is not necessarily inconsistent with "all reasonable effort" for a party covered by the RLA to persist in a proposal to eliminate that excessive cost.

7. Although the Railway Labor Act provision for negotiation imposes a duty on the parties to barain for the purpose of reaching agreement, nothing in the Act requires one party to disclose to the other all the alternatives it has considered and may be willing to accept.

8. The RLA contains status quo requirements which impose an obligation on the parties to refrain from altering the status quo by resorting to self-help while the Act's remedies are being exhausted. *Detroit and Toledo Shore*

Line, R. Co. v. United Transportation Union, 396 U.S. 142 at 149 and 150.

9. Because Qantas fulfilled its bargaining obligations under Section 2, First prior to the implementation of its contracting-out decision, it did not violate the RLA status quo provisions by implementing that decision.

10. Qantas did not violate Section 2, Third and 2, Fourth of the RLA, 45 U.S.C. Section 151.

11. Qantas' communications with its employees during negotiations fell within the bounds of permissible employer communications with employees concerning collective bargaining. *See Independent Federation of Flight Attendants v. Trans World Airlines, Inc.*, 94 LC Para. 13, 635 (W.D. Mo. 1981) (not officially reported); *Flight Engineers International Ass'n v. Eastern Airlines, Inc.*, 208 F.Supp. 182, 193 (S.D.N.Y.), *aff'd on opinion below*, 307 F.2d 510 (2nd Cir. 1962), *cert. denied*, 372 U.S. 945 (1963); *Proctor & Gamble Mfg. Co.*, 160 NLRB 334 (1966).

12. There is no evidence which indicates that employees generally or individually were either disciplined, terminated, or threatened with loss of employment, because they joined or supported the IAM.

13. There was nothing coercive or illegal about Qantas' advice to its employees.

DATED: 7/31/84

SPENCER WILLIAMS
United States District Judge

FILED SEPT 6, 1985
Clerk, U.S. Court of Appeals

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,

Plaintiff-Appellant,

vs.

QANTAS AIRWAYS, LTD.,

Defendant-Appellee.

No. 84-2331
D.C. C-83-0632 SW

MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Honorable Spencer M. Williams, Presiding

Submitted August 14, 1985

BEFORE: NORRIS, REINHARDT, Circuit Judge, and RAY McNICHOLS,** District Judge.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 21.

** Honorable Ray McNichols, Senior Judge, United States District

The plaintiff, International Association of Machinists and Aerospace Workers (hereinafter the Union) contends on appeal that the District Court erred in finding that Qantas Airways, Ltd., (hereinafter Qantas) did not violate the Railway Labor Act, 45 U.S.C. § 151, et seq., by failing "to exert every reasonable effort to make and maintain agreements" prior to terminating 227 employees represented by the Union.

A trial court's findings of fact cannot be set aside unless the findings are clearly erroneous. "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Anderson v. City of Bessemer City, North Carolina*, ___ U.S. ___, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518, 528 (1985). "Where there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous." 105 S.Ct. at 1512. Our task, therefore, is limited to determining whether or not the District Court adopted a permissible view of the evidence and affirm or reverse accordingly.

We have reviewed in detail the briefs of counsel and the record of the proceedings below. Our review of the record indicates the District Court adopted a permissible view of the evidence in determining that Qantas met its Railway Labor Act duty to exert every reasonable effort to make and maintain agreements prior to terminating the Union members' jobs. Whether or not, on the same evidence, we would have reached the same conclusion is of no relevance. See, *e.g., Anderson v. City of Bessemer City*, 105 S.Ct. at 1511. As a result, we hold that the District Court's findings

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Court for the District of Idaho, sitting by designation.

of fact are not clearly erroneous and we, therefore, affirm the trial court.

Qantas' motion for double costs and attorney's fees is denied.

AFFIRMED.

QANTAS MEMORANDUM

TO: ALL MANAGERS
FROM: PERSONNEL DIRECTOR, T/A
OUR REF.: MTZ. 313/A
DATE: October 29, 1982

QANTAS/IAM NEGOTIATIONS AND PRESS REPORTS

Some confusion has resulted from statements printed in the press about anticipated actions by Qantas affecting Australian and United States employees.

Beginning in February, 1982, Qantas has been negotiating with the IAM in an attempt to reach an agreement to contract-out work at Honolulu and San Francisco and to give a severance package to the some 220 employees who will be affected. Contrary to possible interpretations of the press reports, the anticipated contracting-out of work in Honolulu and San Francisco has not been affected by Qantas' very recent decision to offer a "voluntary retrenchment" program to other employees not employed in the United States. So far as the U.S. employees are concerned, they are offered the option of accepting the Company's determination to contract-out and receive whatever severance package the IAM may negotiate, or oppose the Company's determination to contract-out and thus decline any severance payment.

Negotiations about the consequences of contracting-out work in the U.S. will continue with the IAM, if the IAM will notify the Mediator of its desire to continue. Any suggestion in press reports that such negotiations will take place between Qantas and the Australian Council of Trade

Unions (ACTU) is incorrect, although the IAM has been attempting to involve the ACTU in the concerns of Qantas/IAM negotiations.

Please post and circulate this letter to your staff.

Carl R. Feil

CRF/nh

bcc:
Deputy Chief Executive & General Manager Operations
Acting Director of Personnel
General Manager Marketing
Director of Sales & Field Services
Senior Vice President, The Americas

bbcc:
Messrs. M. Gartner, J. Oliver Gluyas, R. Barry Churton, Robert S. Katz

45 U.S.C.

§ 152. General duties — Duty of carriers and employees to settle disputes

First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Consideration of disputes by representatives

Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

Designation of representatives

Third. Representatives, for the purposes of this chapter, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this chapter need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their

representatives of those who or which are not employees of the carrier.

Organization and collective bargaining; freedom from interference by carrier; assistance in organizing or maintaining organization by carrier forbidden; deduction of dues from wages forbidden

Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purpose of this chapter. No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided*, That nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free

transportation to its employees while engaged in the business of a labor organization.

Agreements to join or not to join labor organizations forbidden

Fifth. No carrier, its officers, or agents shall require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization; and if any such contract has been enforced prior to the effective date of this chapter, then such carrier shall notify the employees by an appropriate order that such contract has been discarded and is no longer binding on them in any way.

Conference of representatives; time; place; private agreements

Sixth. In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretations or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify time and place at which such conference shall be held: *Provided*, (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportuunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice: *And provided further*, That nothing in this chapter shall be

construed to supersede the provisons of any agreement (as to conferences) then in effect between the parties.

Change in pay, rules, or working conditions contrary to agreement or to section 156 forbidden

Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title.

Notices of manner of settlement of disputes; posting

Eighth. Every carrier shall notify its employees by printed notices in such form and posted at such times and places as shall be specified by the Mediation Board that all disputes between the carrier and its employees will be handled in accordance with the requirements of this chapter, and in such notices there shall be printed verbatim, in large type, the third, fourth, and fifth paragraphs of this section. The provisions of said paragraphs are made a part of the contract of employment between the carrier and each employee, and shall be held binding upon the parties, regardless of any other express or implied agreements between them.

Disputes as to identity of repressentatives; designation by Mediation Board; secret elections

Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with

the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

45 U.S.C.

§ 155. Functions of Mediation Board—Disputes within jurisdiction of Mediation Board

First. The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 160 of this title) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this chapter.

If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall

be created under section 160 of this title, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose.

Interpretation of agreement

Second. In any case in which a controversy arises over the meaning or the application of any agreement reached through mediation under the provisions of this chapter, either party to the said agreement, or both, may apply to the Mediation Board for an interpretation of the meaning or application of such agreement. The said Board shall upon receipt of such request notify the parties to the controversy, and after a hearing of both sides give its interpretation within thirty days.

Duties of Board with respect to arbitration of disputes; arbitrators, acknowledgment of agreement; notice to arbitrators; reconvening of arbitrators; filing contracts with Board, custody of records and documents

Third. The Mediation Board shall have the following duties with respect to the arbitration of disputes under section 157 of this title:

(a) On failure of the arbitrators named by the parties to agree on the remaining arbitrator or arbitrators within the time set by section 157 of this title, it shall be the duty of the Mediation Board to name such remaining arbitrator or arbitrators. It shall be the duty of the Board in naming such arbitrator or arbitrators to appoint only those whom the Board shall deem wholly disinterested in the controversy to be arbitrated and impartial and without bias as between the parties to such arbitration. Should, however, the Board

name an arbitrator or arbitrators not so disinterested and impartial, then, upon proper investigation and presentation of the facts, the Board shall promptly remove such arbitrator.

If an arbitrator named by the Mediation Board, in accordance with the provisions of this chapter, shall be removed by such Board as provided by this chapter, or if such an arbitrator refuses or is unable to serve, it shall be the duty of the Mediation Board, promptly, to select another arbitrator, in the same manner as provided in this chapter for an original appointment by the Mediation Board.

(b) Any member of the Mediation Board is authorized to take the acknowledgment of an agreement to arbitrate under this chapter. When so acknowledged, or when acknowledged by the parties before a notary public or the clerk of a district court or a court of appeals of the United States, such agreement to arbitrate shall be delivered to a member of said Board or transmitted to said Board, to be filed in its office.

(c) When an argument to arbitrate has been filed with the Mediation Board, or with one of its members, as provided by this section, and when the said Board has been furnished the names of the arbitrators chosen by the parties to the controversy it shall be the duty of the Board to cause a notice in writing to be served upon said arbitrators, notifying them of their appointment, requesting them to meet promptly to name the remaining arbitrator or arbitrators necessary to complete the Board of Arbitration, and advising them of the period within which, as provided by the agreement to arbitrate, they are empowered to name such arbitrator or arbitrators.

(d) Either party to an arbitration desiring the reconvening of a board of arbitration to pass upon any controversy arising over the meaning or application of an award may so notify the Mediation Board in writing, stating in such notice the question or questions to be submitted to such reconvened Board. The Mediation Board shall thereupon promptly communicate with the members of the Board of Arbitration, or a subcommittee of such Board appointed for such purpose pursuant to a provision in the agreement to arbitrate, and arrange for the reconvening of said Board of Arbitration or subcommittee, and shall notify the respective parties to the controversy of the time and place at which the Board, or the subcommittee, will meet for hearings upon the matters in controversy to be submitted to it. No evidence other than that contained in the record filed with the original award shall be received or considered by such reconvened Board or subcommittee, except such evidence as may be necessary to illustrate the interpretations suggested by the parties. If any member of the original Board is unable or unwilling to serve on such reconvened Board or subcommittee thereof, another arbitratior shall be named in the same manner and with the same powers and duties as such original arbitrator.

(e) Within sixty days after June 21, 1934, every carrier shall file with the Mediation Board a copy of each contract with its employees in effect on the 1st day of April 1934, covering rates of pay, rules, and working conditions. If no contract with any craft or class of its employees has been entered into, the carrier shall file with the Mediation Board a statement of that fact, including also a statement of the rates of pay, rules, and working conditions applicable in dealing with such craft or class. When any new contract is executed or change is made in an existing contract with any class or craft of its employees covering rates of pay, rules,

or working conditions, or in those rates of pay, rules, and working conditions of employees not covered by contract, the carrier shall file the same with the Mediation Board within thirty days after such new contract or change in existing contract has been executed or rates of pay, rules, and working conditions have been made effective.

(f) The Mediation Board shall be the custodian of all papers and documents heretofore filed with or transferred to the Board of Mediation bearing upon the settlement, adjustment, or determination of disputes between carriers and their employees or upon mediation or arbitration proceedings held under or pursuant to the provisions of any Act of Congress in respect thereto; and the President is authorized to designate a custodian of the records and property of the Board of Mediation until the transfer and delivery of such records to the Mediation Board and to require the transfer and delivery to the Mediation Board of any and all such papers and documents filed with it or in its possession.

May 20, 1926, c. 347, § 5, 44 Stat. 580; June 21, 1934, c. 691, § 5, 48 Stat. 1195; June 25, 1948, c. 646, § 32(a), 62 Stat. 991; May 24, 1949, c. 139, § 127, 63 Stat. 107.

45 U.S.C.

§ 156. Procedure in changing rates of pay, rules, and working conditions

Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

May 20, 1926, c. 347, § 6, 44 Stat. 582; June 21, 1934, c. 691, § 6, 48 Stat. 1197.

45 U.S.C.

§ 182. Same; duties, penalties, benefits, and privileges

The duties, requirements, penalties, benefits, and privileges prescribed and established by the provisions of sections 151 to 152 and 154 to 163 of this title shall apply to said carriers by air and their employees in the same manner and to the same extent as though such carriers and their employees were specifically included within the definition of "carrier" and "employee", respectively, in section 151 of this title.

May 20, 1926, c. 347, § 202, as added Apr. 10, 1936, c. 166, 49 Stat. 1189.

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 3550 Wilshire Boulevard, Suite 916, Los Angeles, California. On this date, December 5, 1985, I served the within PETITION FOR WRIT OF CERTIORARI in re: "International Association of Machinists and Aerospace Workers, AFL-CIO vs. Qantas Airways, Ltd." in the United States Supreme Court, October Term, 1985, No. .....

on the persons interested in said action by placing 3 true copies thereof enclosed in sealed envelopes with first class postage prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

MURRAY GARTNER
PROSKAUER, ROSE, GOETZ & MENDELSOHN
18th Floor
300 Park Avenue
New York, New York 10022

All parties required to be served have been served.

I certify (or declare) under penalty of perjury that the foregoing is true and correct.
Executed on December 5, 1985
at Los Angeles, California.

Kathleen Kattenel

Supreme Court, U.S.
FILED
JAN 10 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-984

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,
Petitioner,

vs.

QANTAS AIRWAYS, LTD.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Counterstatement of the Question Presented

Should this Court review findings of fact on the basis of which the district court concluded that Qantas had fulfilled its duty under Section 2, First of the Railway Labor Act, 45 U.S.C. § 152, First, to exert every reasonable effort to make and maintain agreements, when the court below, after detailed examination, held those findings were not clearly erroneous?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-984

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,

Petitioner,

vs.

QANTAS AIRWAYS, LTD.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent Qantas Airways, Ltd.[1] opposes the petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit issued in this case on September 6, 1985.

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1 In accordance with the requirements of Rule 28.1, Qantas Airways, Ltd. states that it is a corporation established under the laws of the State of Queensland, Commonwealth of Australia. All of the presently issued and outstanding capital shares of Qantas are beneficially owned by the Australian Government. Qantas has an ownership interest in the following Australian companies (excluding wholly-owned subsidiaries): Fiji Resorts, Ltd; Travel Industries Automated Systems Proprietary, Ltd.

Statement of the Case

Petitioner International Association of Machinists and Aerospace Workers, AFL-CIO ("IAM") brought this action against Qantas Airways, Ltd. ("Qantas") in February 1983, alleging that Qantas, in negotiations with the IAM which extended for almost a year, had not fulfilled its obligation to bargain as required by Section 2, First of the Railway Labor Act ("RLA"). The IAM contended that Qantas had made an irrevocable decision to contract out its airport work before the negotiations began, and consequently was unwilling to bargain with the IAM over that decision as required by the RLA.

The district court dismissed the IAM's complaint, under F.R.Civ.P. Rule 41(b), at the close of plaintiff's case. In detailed and specific findings of fact, the district court found that there was no evidence to sustain the IAM's claim of an irrevocable decision to contract out the work, and that Qantas, throughout the negotiations, invited and would have considered alternative proposals, which the Union never made, to achieve a comparable reduction in airport operating costs. The court also specifically found against petitioner's subsidiary contentions pressed here, that Qantas had taken steps to lock itself into its proposal, and had failed to provide the union with relevant information. On appeal, the Court of Appeals for the Ninth Circuit "reviewed in detail the briefs of counsel and the record of the proceedings below" (Pet. App., p. 27), held that "the District Court's findings of fact are not clearly erroneous" (Pet. App., p. 28) and affirmed the judgment of the trial court.

The facts found by the district court, and affirmed by the court of appeals, can be summarized as follows:

1. In February, 1982, Qantas proposed to the IAM that the existing agreements, which covered airport and non-airport employees, be changed to permit contracting out of airport work at San Francisco and Honolulu. Qantas explained to the

IAM that to do that work with its own employees, even taking into consideration the revenues earned from handling other carriers, cost Qantas over $2,500,000 a year more than what it would cost to get that work done by outside contractors, and that if the other carriers cancelled their handling contracts, as several carriers had done in the past, the excess cost to Qantas would be $5,000,000 per year (FF 11, 12, 21, 25).[2] Qantas provided the Union with a detailed financial explanation of the economic and business reasons for its proposal to contract out the airport work, and offered to answer any questions about the economics of the Company's proposal; the Company provided all of the information requested by the Union (FF 31, 32, 33).

2. From the very start of the negotiations Qantas told the Union that its contracting-out proposals were "negotiable" (FF 26). Throughout the negotiations, the Company repeatedly stated at the bargaining table that it was willing to listen to cost-saving alternatives to contracting out (FF 55).

3. During the entire period of direct negotiation and statutory mediation, however, from March 1982 through January 6, 1983, the IAM made it clear to the Company that it was adamantly opposed to the entire concept of contracting out of work and refused even to discuss Qantas' proposals; during the same time, the Union "did not introduce a single cost-saving alternative proposal to contracting-out" (FF 42, 65, 86).

4. The final 30 day cooling-off period under the RLA began on January 7, 1983. Three days later, Qantas suggested that the parties resume negotiation in a continuing effort to reach agreements, and stated that it remained willing to consider any alternative proposals by the Union with respect to the airport work, which would result in cost savings comparable to what

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2 References are to the district court's Findings of Fact ("FF") and Conclusions of Law ("COL"), reproduced at pages 1-25 of the Appendix to the Petition.

would be achieved by contracting-out (FF 64, 67). On January 19, the Union, for the first time, made an alternative proposal, which it stated would save the Company over $2 million annually. (FF 71). On the following day, the Company reported to the Union that its calculation indicated that the Union's proposal would save only approximately $500,000, and asked the Union for further explanation. The Union, instead, withdrew its proposal, and refused to discuss it further (FF 73).

5. While the NMB conducted additional non-statutory mediation sessions from February 1 through February 4, 1983, the Union did not resubmit its January 19 proposal, did not provide any further detail or explanation of that proposal, and did not make any other proposals (FF 74, 77). On February 6, 1983, after the cooling-off period had expired, Qantas implemented its proposal to contract out the airport work in Honolulu and San Francisco (FF 78).

6. The district court specifically found that "Qantas was willing to negotiate with the Union on the contracting out decision *and* on its effects" (FF 79, emphasis in original). Noting that the Company negotiating team had been instructed to take a "firm stance" in the negotiations, the court found that "its instructions made clear that the Company was flexible and would modify its position should that become desirable in the course of negotiations" (*id.*), and that "[t]he Company negotiating team was in fact flexible" (*id.*). In two fundamental findings, the court conclusively rejected plaintiff's contention that Qantas had refused, or would have refused, to bargain over the decision to contract out the airport work, because there was no evidence to support that contention:

> "83. There is no evidence that either before or after the commencement of negotiations, but prior to February 6, 1983, Qantas made an irrevocable decision to contract out all of its airport handling work in San Francisco and Honolulu, or that Qantas refused to bargain over the decision to contract out the work, or that Qantas engaged

in 'surface bargaining.' Nor is there evidence that the Company deliberately misled the Union as to the existence of economically equivalent alternatives to contracting-out for the purpose of discouraging meaningful negotiations.

* * *

85. Plaintiff has failed to show that if the Union had presented the Company with concrete alternative cost-saving proposals, the Company would have refused to consider them. The Company was interested in reducing its costs and would have considered any proposal which would have accomplished that goal, particularly if it would have avoided the risk of a strike. The Union's efforts were concentrated on trying to get the Company to submit alternative proposals for the Union to consider, rather than on making such proposals for the Company to consider."

Reasons Why the Writ Should Not Be Granted

I. The Petition Presents Only Questions Of Fact, Which Are Inappropriate For Review By This Court.

Petitioner's statement of the question it seeks to have this Court review, confusing fact and law, obscures its basic thrust, that this Court should review findings of fact of the district court which the Court of Appeals, after careful review, held were not clearly erroneous. Petitioner, with unjustified alarm, now claims that the Court of Appeals "decided a federal question in a way that will impact industrial relations" (Pet. p. 4), and that it "endorsed an approach to collective bargaining negotiations which violates the objectives of the RLA" and "completely undermines the law governing labor relations in the railway and airline industries" (*id.*).

In the court below, however, petitioner asserted only that ten findings on which the district court based its conclusion that Qantas had fulfilled its bargaining obligations were clearly

erroneous, not that those findings did not support the conclusion that there was nothing legally wrong with Qantas' "approach to the negotiations". In the face of the Court of Appeals' careful determination that those findings were not clearly erroneous, petitioner here merely points to four segments of evidence which it argues should have resulted in three different findings; it does not review the much greater body of evidence which justified both courts below in making and sustaining the three findings which are now contested. Petitioner's attempt to make an important "federal question" out of its disagreement with findings of fact must fail, since there is no federal question in the light of the determination by the court below that the findings were not clearly erroneous.

It is well established that, absent unusual circumstances, this Court will not accept a case for review where only questions of evidence and factual findings are involved. *See, e.g., United States* v. *Johnston*, 268 U.S. 220, 227 (1925), (Court does not "grant a certiorari to review evidence and discuss specific facts"), *cited in Superintendent, Massachusetts Correctional Institution* v. *Hill*, 105 S.Ct. 2768, 2777 (1985) (Stevens, J., concurring in part and dissenting in part). Particularly where the findings of fact made by the district court received the concurrence of the Court of Appeals, there is almost never a reason for this Court to review the decisions below. *See, e.g., Rogers* v. *Lodge*, 458 U.S. 613, 623 (1982) ("this Court has frequently noted its reluctance to disturb findings of fact concurred in by two lower courts"); *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275 (1949) ("a court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error"), *quoted in Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967).

Petitioner never disputed below—and does not dispute here—the legal standard applied by the district court in evaluating whether Qantas fulfilled its duty under RLA Section 2, First to exert every reasonable effort to make agreements

concerning rates of pay, rules and working conditions, as follows:

> "An employer who wishes to contract out is under a duty imposed by Section 152, First to indicate its desire to contract out and stand ready to listen to and consider the Union's opposing arguments and counterproposals, if any" (COL 5, Pet. App. 24).

Nor was there any dispute that, under the Railway Labor Act, Qantas was free to persist in its proposal to contract out the work—particularly in the absence of any serious alternative proffered by the Union—and that the duty to bargain in good faith does not require either party to surrender a proposal, on a mandatory subject of bargaining, which is important to it (COL 6, Pet. App. 24). *Virginian Ry.* v. *System Federation No. 40*, 300 U.S. 515, 547-48 (1937).[3] The lower courts found—as a matter of fact—that Qantas fully satisfied this uncontested legal standard. It notified the Union of its proposal to contract out, it invited alternative proposals, and would have considered any proposals which the Union made, as it did consider the one proposal which the Union belatedly made and immediately withdrew. In short, "Qantas was willing to negotiate with the Union on the contracting out decision *and* on its effects" (FF 79).

Since the case does not present any important question of law, and turns solely on the particular facts found by the courts below, review by this Court is clearly unwarranted.

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3 When this Court held the obligation imposed by Section 2, First to be judicially enforceable, it did not construe that statutory provision to mean more than "avoidance of 'bad faith' " in the sense of going through the motions with a "desire not to reach agreement" *Chicago and North Western Ry. Co.* v. *United Transportation Union*, 402 U.S. 570, 578 (1971).

In fact, this Court cautioned that in any possible determination of violation of Section 2, First, "great circumspection should be used in going beyond cases involving 'desire not to reach an agreement', for doing so risks infringement of strong federal labor policy against governmental interference with the substantive terms of collective bargaining agreements." 402 U.S. at 579, n. 11.

II. The Courts Below Rejected the IAM's Portrayal of Qantas' "Approach to the Negotiations".

Instead of accepting and addressing the facts as found below, petitioner relies on what it refers to as "strong evidence" (Pet., p. 11) that "Qantas' approach to the negotiations" (*id.*) violated its duty under RLA Section 2, First, in three respects. In each instance, Petitioner relies on particular pieces of evidence, or portions of findings, taken out of context, and ignores the specific and dispositive findings concurred in by the two lower courts.

The Two Courts' Findings:

A. Qantas Did Not Take The Position That It Would Not Bargain About The Decision To Contract Out The Work. The IAM asserts that "Qantas' approach to the negotiations was to bargain only about the terms of the severance package which might be made available to employees and that there would not be any meaningful negotiations over the *decision* to contract out" (Pet. p. 6, emphasis in original), and that Qantas took the position that its intent to contract out bargaining unit work was "non-negotiable" (Pet. pp. 4, 11, 12). These factual contentions are completely contrary to the findings made by the lower courts. (See pp. 3-5, above.) Petitioner simply persists in setting forth its own twice-rejected view of the evidence, focusing on two isolated statements made in the course of nearly a year of negotiation and mediation, and ignoring the wealth of evidence, documentary and testimonial, which persuaded the district court that Qantas' contracting-out proposals were "negotiable", that "the Company was flexible", and that the "Company negotiating team was in fact flexible" (FF 26, 79).

1. Qantas Deputy Chief Executive Ronald Yates met with two union officials on September 13, 1982, in a meeting requested by the Union and held apart from the regular negotiation sessions. The union officials who attended testified

that, although they had no proposal to make to the Company after nearly six months of fruitless negotiations, they hoped to persuade Yates to abandon the contracting-out proposal. The Court found that "Yates was aware that the Union's purpose in asking to meet with him was to determine whether the Company's contracting-out proposal was a 'hard' or 'soft' proposal" and that "he therefore told the Union representatives the Company's position on contracting-out to save excess costs was 'non-negotiable' ". (FF 53, 54). As the occasion and context of that statement make clear, Yates said that the Company's proposal was "non-negotiable", not in the sense that the Company would not listen to whatever alternatives the Union had to propose, but that it was a "hard" proposal which the Company would not withdraw in the absence of alternatives. His statement was understood in just that sense by the Union representative (FF 54). Indeed, as the court specifically found, both before and after the meeting of September 13, the Company repeatedly stated at the bargaining table that it would be willing to listen to cost savings alternatives to contracting out (FF 55).

2. Contrary to Appellant's argument that the October 29, 1982 memorandum to line managers should be read as saying that Qantas would negotiate only about the "effects" of contracting-out, that memorandum, in fact, was a status report of what was on the table in the United States negotiations at that time, in contrast to what the Company was offering its employees in Australia. By September 23, 1982, the Union negotiators still had made no cost-reduction proposal (FF 42, 53, 65), and the chief Union negotiator told the mediator that he wanted a recess to seek authority to negotiate on the Company offer for an agreement on contracting-out (FF 57). Qantas therefore told its managers that the Company and mediator were still awaiting an answer and that, if the Union got that authority, negotiations would continue on that subject, since that was the only proposal on the table. The status report cannot be construed, nor was it by the courts below, as a statement that Qantas was refusing, or had ever refused, to

bargain on any other proposal the Union might have made, but which it had, up to that point, adamantly refused to make.

B. Qantas Did Not Take Steps To Limit Its Flexiblity In Negotiations. The IAM also asserts that "Qantas took steps that would economically make it difficult to alter its proposal" (Pet., p. 7), and that it "cemented that position by making it economically unfeasible to seriously consider other alternatives" (Pet., p. 11). This contention is based on the cancellation, by Singapore Airlines, of its handling contract with Qantas, effective October 1, 1982; the IAM says that "[t]he obvious result was to place Qantas in a position where a major source of its revenue was eliminated, thus limiting its flexibility in its negotiations with the IAM . . ." (Pet., p. 8). Again, the IAM simply overlooks the findings made by the district court, which thoroughly rejected the IAM's claim that Qantas took action to induce Singapore to cancel its contract. On the contrary, the court specifically found that "Qantas did not induce Singapore Airlines to cancel its contract with Qantas, thereby limiting Qantas' flexibility in negotiations" (FF 94). It found that Singapore acted independently of Qantas and in its own interests in investigating and making other handling agreements (FF 95, 99), and that "[w]hatever the ultimate resolution of the IAM negotiations, it was clearly in Qantas' economic self-interest to retain Singapore's handling as long as possible." (FF 100)

C. Qantas Did Not Fail To Provide The Union With Relevant Information. The IAM's final contention is that Qantas failed to provide the Union with certain financial information. It asserts that the district court's finding to the contrary that the IAM "was provided with all information requested" (FF 33) was "clearly erroneous." (Pet., p. 8) The "Optimum Staffing" Study, however, which the IAM says it was denied, was an internal company study of the possible cost-savings under the most favorable staffing patterns, assuming unrestricted use of part-time employees and cross-utilization of

employees, not possible under the existing agreements. The conclusion of the study was that "optimum staffing" was incapable of producing the desired savings, since it would cost the Company $3 million more annually to do the work with "optimum staffing", than it would cost to contract out. (FF 36). The evidence was clear that the Union did not ask for the Optimum Staffing survey, since it had somehow already improperly obtained it, but only asked why the Company was making such a survey when it said it wanted to contract out the work.

The Company was not concealing any financial information to insure that the IAM would not be aware of economically desirable alternatives to contracting out, as the petitioner suggests; on the contrary, the Company did not want the union to be misled into the belief that "optimum staffing" was the Company's optimum objective, since it was not even a cost-saving alternative. Indeed, the Company informed the Union on April 1 that the Union had all the necessary financial and manpower information to conduct its own study on "optimum" staffing, but that Qantas could still get the work done for less by contracting out. (FF 37). There is no cause for this Court to review the finding concurred in by two lower courts, that there was no evidence "that the Company deliberately misled the Union as to the existence of economically equivalent alternatives to contracting-out for the purpose of discouraging meaningful negotiations". (FF 83).

Conclusion

Since it raises only questions of fact without any showing that the court below was not justified in holding that the district court's findings were not clearly erroneous, the petition for a writ of certiorari should be denied.

Dated: New York, New York
January 8, 1986

Respectfully submitted,

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